

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**In re: National Hockey League Players'  
Concussion Injury Litigation**

**MDL No. 14-2551 (SRN/BRT)**

**This Document Relates to All Actions**

**MEMORANDUM OPINION  
AND ORDER**

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SUSAN RICHARD NELSON, United States District Judge.

This matter is before the Court on Plaintiffs' Motion to Exclude Declarations of Defendant's Experts for Purposes of Plaintiffs' Motion for Class Certification. (Doc. No. 872, "Plaintiffs' Motion to Exclude".) The Court held a hearing on Plaintiffs' Motion to Exclude on July 11, 2017. (Doc. No. 882, Min. Entry for Formal Status Conf.

and Mot. Hr'g; Doc. No. 887, Tr. of Status Conf. and Mot. Hr'g.) For the reasons set forth herein, Plaintiffs' Motion to Exclude is granted in part and denied in part.

## **I. Background**

### **A. Motion for Class Certification and Disclosure of Experts<sup>1</sup>**

Plaintiffs filed their Motion to Certify Class and for Appointment of Class Representatives and Class Counsel on December 8, 2016. (Doc. No. 638.) Plaintiffs also filed the declarations of their experts, Dawn R. Comstock, D'Arcy Jenish, Stephen T. Casper, Thomas Blaine Hoshizaki, and Robert C. Cantu. (Doc. Nos. 642–46.) On April 27, 2017, Defendant filed its Memorandum in Opposition to Plaintiffs' Motion to Certify Class and for Appointment of Class Representatives and Class Counsel. (Doc. No. 787.)<sup>2</sup> The same day, Defendant moved to exclude all of Plaintiffs' experts under

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<sup>1</sup> The parties proposed a Schedule Regarding Issues Related to Class Certification along with their Rule 26(f) Report. (Doc. No. 50-4.) The Court then adopted Pretrial Order No. 8, Schedule Regarding Issues Related to Class Certification, governing deadlines related to class certification. (Doc. No. 69.) A Revised Schedule Regarding Issues Related to Class Certification was issued on November 6, 2015. (Doc. No. 296.) Another Revised Schedule amended deadlines and also modified the provisions relating to rebuttal expert reports. (Doc. No. 555 (“If Plaintiffs conclude that rebuttal expert reports are necessary (not “new” expert reports but true “rebuttal” expert reports) and choose to file them with their reply brief, the NHL may seek leave of the Court to file a sur-reply and/or take additional deposition testimony. At that time, the Court will consider the nature of the rebuttal expert testimony and whether further discovery and briefing is warranted.”).) A Second Revised Schedule Regarding Issues Related to Class Certification and Amended Pretrial Order No. 22 was issued on September 8, 2016, as Pretrial Order No. 22, modifying deadlines and the hearing date. (Doc. Nos. 604 and 605.)

<sup>2</sup> The Court's Amended Pretrial Order No. 22, Second Revised Schedule Regarding Issues Related to Class Certification, required Defendant to “file its memorandum in opposition to class certification on or before April 27, 2017. In its memorandum, the  
(Footnote Continued on Next Page)

Rule 702 and Daubert. (Doc. Nos. 755 (Jenish), 761 (Casper), 767 (Cantu), 772 (Comstock), and 781 (Hoshizaki).) With these filings, Defendant disclosed a total of nineteen experts “in support of Defendant NHL’s Opposition To Plaintiffs’ Motion For Class Certification And For Appointment Of Class Representatives And Class Counsel and in support of the NHL’s contemporaneously filed motions to exclude the testimony of plaintiffs’ experts.”<sup>3</sup>

**B. Plaintiffs’ Motion to Exclude Expert Declarations for Purposes of Plaintiffs’ Motion for Class Certification**

At a formal status conference held on May 12, 2017, Plaintiffs raised concerns about the number of experts Defendant had disclosed. (Doc. No. 861, Transcript of 5/12/17 Status Conference 9–12, 26–29.) In particular, Plaintiffs argued that Defendant’s

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NHL shall identify all experts and witnesses upon whom it relies in opposition to plaintiffs’ motion (including the information contemplated by Fed. R. Civ. P. 26(a)(2)(B) as to experts) and file as exhibits any expert reports or affidavits upon it relies.” (Doc. No. 605, ¶ 3.)

<sup>3</sup> (See Doc. No. 732, Attachments 1–11 (Exhibits A-Decl. of Lisa A. Brenner; B-Decl. of John David Cassidy; F-Decl. of Dr. James R. Funk; G-Decl. of Kevin Guskiewicz; I-Decl. of Grant L. Iverson; J-Expert Report of Sonya Kwon; K-Decl. of Paul R. McCrory; L-Decl. of Douglas B. McKeag; M-Decl. of William Neale; Q-Decl. of Dr. Matthew Panzer; and R-Decl. of Christopher Randolph); see also Doc. Nos. 733–36, 738–42, 744–49 (Sealed and Redacted Versions of Exhibits C-Decl. of Rudolph J. Castellani; D-Suppl. Decl. of Jennifer Finkel; H-Decl. of Lili-Naz Hazrati; N-Reports of Neuropsychological Examinations of Individual Plaintiffs Conducted by Dr. Marc Norman; O-Suppl. Decl. of C. Warren Olanow; S-Decl. of Joseph B. Sala; T-Decl. of Julie Ann Schneider; U-Decl. of Kristine Yaffe).) Dr. Olanow and Dr. Finkel also conducted individual medical evaluations of proposed class representative plaintiffs. The reports of these evaluations were filed separate from their declarations. (Doc. No. 737, Beisner Decl. Ex. E; Doc. No. 743, Beisner Decl. Ex. P.) They are not at issue in Plaintiffs’ Motion to Exclude.

disclosure of nineteen experts was disproportionate to their own disclosure of five, and “the number of experts that were filed in connection with the class certification motion are cumulative and duplicative in many respects.” (*Id.* at 10–11.) After the status conference, the Court issued a briefing schedule on Plaintiffs’ “motion to strike expert reports” and set a hearing for July 11, 2017. (Doc. No. 867.) The Court also issued an order extending the time for Plaintiffs’ responses to the Defendant’s Daubert motions until September 8, 2017; extending the time for Defendant’s Reply in support of its Daubert motions until October 6, 2017; extending the time for Plaintiffs’ Reply in support of their Motion for Class Certification to October 6, 2017; and setting the hearing on these motions for October 11, 2017. (Doc. No. 882.)

Plaintiffs timely filed their Motion to Exclude. (Doc. No. 872.) Plaintiffs argue that an unspecified number of Defendant’s expert declarations should be excluded because the Court should not be burdened or inconvenienced with the task of sorting through nineteen expert reports at the class certification stage. (Doc. No. 887, Transcript of 7/11/17 Status Conference 14–15.) Framing their arguments around thirteen class certification “issues,” Plaintiffs ask the Court to determine that Defendant’s nineteen expert declarations are cumulative or not relevant in the context of a motion for class certification; require Defendant to designate one expert on each of the thirteen class certification issues; and exclude such portions of Defendant’s expert declarations that do not fall within those parameters. (Doc. No. 873, Pls.’ Mem. in Supp. of Mot. to Excl. 25.)

In opposition, Defendant argues that its expert opinions are not cumulative, but

even if they are, Plaintiffs’ motion is premature because concerns about cumulative evidence relate to the presentation of evidence to a jury at trial, not to a court when deciding class certification. (Doc. No. 881, Def.’s Mem. in Opp. to Pls.’ Mot. to Excl. 1–2, 5–38.) Defendant also argues Plaintiffs’ proposed rule that only one expert be allowed to speak on any issue is both prejudicial and impracticable because it would mean that Defendant and Plaintiffs would have to submit new expert declarations. Moreover, Defendant argues that Plaintiffs themselves offered multiple experts on a range of issues. (Id. at 2–5, 35, 39, 44–46.) Finally, even if some of Defendant’s expert opinions relate to merits issues, Defendant argues this offers no justification to strike because class and merits issues often overlap for purposes of the Court’s rigorous class certification analysis. (Id. at 3, 39–44.)

## **II. Discussion**

### **A. The Court’s Inherent Authority**

Trial courts have “inherent authority and broad discretion to exclude cumulative expert testimony, if it is not done ‘arbitrarily, or on the basis of mere numbers.’” Olsen v. Delcore, No. 07-CV-334 TS, 2009 WL 3055408, at \*1 (D. Utah Sept. 24, 2009) (citing Nalder v. West Park Hosp., 254 F.3d 1168, 1173 (10th Cir. 2001)). Rule 403 of the Federal Rules of Evidence, in conjunction with this inherent authority, provides “another basis to exclude cumulative or duplicative expert witnesses.” Id.; Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence.”). The discretion to exclude or strike expert testimony can be used at any stage of the

proceedings, not just at trial. See, e.g., Aetna Cas. & Sur. Co. v. Guynes, 713 F.2d 1187, 1193 (5th Cir. 1983) (explaining that a trial judge “can exercise this discretion before trial”).

The Court’s consideration of Plaintiffs’ Motion to Exclude and its exercise of discretion takes into account the district court’s obligation to undertake a “rigorous analysis” when it considers class certification to ensure that the requirements of Rule 23 are met. Bennett v. Nucor Corp., 656 F.3d 802, 814 (8th Cir. 2011). “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim, and the district court may resolve disputes going to the factual setting of the case if necessary to the class certification analysis.” Id. (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) and Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005)). Therefore, “[e]xpert disputes ‘concerning the factual setting of the case’” must be resolved “to the extent ‘necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class.’” In re Zurn Pex Plumbing Prods. Liability Litig., 644 F.3d 604, 611 (8th Cir. 2011) (quoting Blades, 400 F.3d at 567). As the Second Circuit has explained,

To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements.

In re IPO Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). Later, when considering class certification, the court will resolve disputes among the varying expert opinions to the extent that those disputes are relevant to the requirements of Rule 23. See Blades, 400

F.3d at 575.

**B. Defendant Relies Upon a Subset of Expert Declarations and Opinions in its Memorandum in Opposition to Class Certification**

Defendant was required to “file its memorandum in opposition to class certification on or before April 27, 2017,” and in that memorandum, required to “identify all experts and witnesses upon whom it relies in opposition to plaintiffs’ motion (including the information contemplated by Fed. R. Civ. P. 26(a)(2)(B) as to experts) and file as exhibits any expert reports or affidavits upon it relies.” (Doc. No. 605, ¶ 3.) As noted above, Defendant filed a total of nineteen expert reports in connection with its class certification and Daubert motion briefing. While the number of experts disclosed by Defendant is disproportionate to the number disclosed by Plaintiffs, the number does not by itself render the opinions duplicative.

The expert citations in Defendant’s Memorandum in Opposition to Class Certification are summarized below:

<b>Expert</b>	
Dr. Kevin Guskiewicz	¶ 66
Dr. Lilli-Naz Hazrati	¶¶ 30, 32–33, 40, 48, 52, 70–73, 91
Dr. Grant Iverson	¶¶ 21, 23, 73–78, 87–88, 134–136, 137–43, 151
Ms. Sonya Kwon	Report at 9–10
Dr. Paul McCrory	¶¶ 43, 96–97
Dr. Douglas B. McKeag	¶ 23
Dr. Lisa A. Brenner	¶¶ 50, 63, Brenner Table 1
Dr. John David Cassidy	¶¶ 19, 21, 23, 27, 31, 61, 119–20
Dr. Rudolph J. Castellani, Jr.	¶¶ 21, 25, 26, 69, 70, 77–82, 102, 104, 109, 113, 117, 119, 127, 133–34 <sup>4</sup>
Dr. Christopher Randolph,	¶¶ 25(d)(ii), 27

<sup>4</sup> There are no corresponding paragraphs 133–34 in Castellani’s Declaration.



Dr. Joseph B. Sala	¶¶ 16, 38, 40
Dr. Julie Ann Schneider	¶¶ 37–38
Dr. Kristine Yaffe	¶¶ 14, 22, 39, 42–61, 71
Dr. Matthew Panzer	¶¶ 14, 23
Dr. Jennifer Finkel	¶¶ 14(a), 14(c), 15, 17–21, 24–28, 57
Dr. Warren Olanow	¶¶ 21, 34–37, 39, 46, 58–82, 92, 94 n.92, 95–96, 99

Defendant did not identify Drs. Norman, Funk, or Mr. Neale in its Opposition to Class Certification. Accordingly, Plaintiffs’ Motion to Exclude is granted in part to make clear that Plaintiffs need not rebut the opinions of Drs. Norman and Funk, or Mr. Neale for purposes of class certification. That leaves sixteen experts for Plaintiffs to consider for purposes of class certification.

Plaintiffs do not seek to exclude the opinions of two of those sixteen experts—Dr. Joseph Sala or Ms. Sonya Kwon. Because Plaintiffs do not contend that these declarations overlap or are duplicative, and they are not at issue in Plaintiffs’ motion, they are not excluded for purposes of class certification.

**C. Defendant’s Reliance on Expert Opinions to Support Defendant’s Daubert Motions**

Separate and apart from its Opposition to Class Certification, Defendant also relies upon most of the same pool of experts and the same declarations to support its Daubert motions.<sup>5</sup> For example, for purposes of Defendant’s Daubert motions, Defendant relies upon Drs. Brenner, McKeag, Cassidy, Yaffe, McCrory, Guskiewicz, Iverson, Randolph,

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<sup>5</sup> Defendant moved to exclude the expert testimony of Jenish (Doc. No. 755), Casper (Doc. No. 761), Cantu (Doc. No. 767), Comstock (Doc. No. 772), and Hoshizaki (Doc. No. 781). Defendant’s Daubert motions will be heard with Plaintiffs’ Motion for Class Certification.

Funk, Panzer, Olanow, Ms. Kwon, and Mr. Neale. Plaintiffs will need to address the opinions of these experts in their responsive briefing. This Order does not address the parties' Daubert motions or responses to Daubert motions.

**D. The Court's Review of the Experts Relied Upon by Defendant Shows Little Overlap**

Plaintiffs organized their Memorandum in Support of their Motion to Exclude around thirteen class certification issues, arguing that Defendant's expert declarations overlap on these issues. The Court has carefully reviewed Plaintiffs' arguments that certain sections of Defendant's expert declarations are duplicative or cumulative on each of the issues. In addition, the Court carefully reviewed the expert opinions identified in Defendant's Opposition to Class Certification. As discussed below, the Court finds insufficient overlap to warrant limiting the experts or excluding all or part of the Defendant's expert declarations for purposes of class certification. And to the extent there is overlap, Plaintiffs' burden to rebut duplicative opinions is outweighed by the burden Defendant would face if required to revise its expert declarations and opinions.

**Issue 1: The Lack of Causation from Case Studies (Brenner, Cassidy, Castellani, Guskiewicz, Hazrati, Iverson, Schneider, and Yaffe)**

Plaintiffs contend that Defendant's disclosure of eight experts to respond to Drs. Cantu and Comstock's discussion of case studies is excessive. In their Motion to Exclude, Plaintiffs identify the following sections of the expert declarations as duplicative: Brenner at Section II A (§§ 40–42); Cassidy at Sections V, IX and X (§§ 45–78; 95–120; 121–32); Castellani at Section III. C. and Section VI (§§ 103–20; 129–30); Guskiewicz (§§ 1–80); Hazrati in the section titled “There is No Threshold of Exposure

to Head Trauma that Correlates to Pathology” (¶¶ 29–32); Iverson at Section V. G. (¶¶ 125–32); Schneider at section titled “Limitations of the CTE Studies to Date” (¶¶ 30–50); and Yaffe at Sections D (¶¶ 23–35) and G (¶¶ 36–41).

Within the above sections, however, Defendant cites only to Cassidy ¶¶ 61, 119–20; Castellani ¶¶ 104, 109, 113, 117, 119; Guskiewicz ¶ 66; Hazrati ¶ 30, 32; Schneider ¶¶ 37; and Yaffe ¶ 39. The Court has carefully reviewed the paragraphs cited to by Defendant and finds some overlap; however, most of the overlap in the relied upon opinions addresses Defendant’s general argument regarding the lack of causation from case studies in response to Plaintiffs’ argument that “[T]he record of scientific study in concussions, subconcussive blows, and associated NDDCs long ago established the medical and scientific community’s knowledge that repetitive head impacts increase the likelihood of chronic neurodegenerative disease.” (Doc. No. 640, Mem. of Law in Supp. of Pls.’ Mot. for Class Cert. (“Pls.’ Mem.”) 13.) It is not overly burdensome for Plaintiffs to rebut this general opinion. To the extent Plaintiffs understand the opinion is duplicative, their experts can offer the same rebuttal point if they choose.

The Court has also reviewed Defendant’s Opposition to Class Certification and recognizes that multiple experts address certain case studies, articles, or reports.<sup>6</sup> For example, multiple experts discuss the boxing studies, including Martland. (See Castellani

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<sup>6</sup> (See Cassidy ¶¶ 19, 21, 23, 27, 31 (Def.’s Mem. 11 n.16, 12, 15, 19, 84); Castellani ¶¶ 21, 26, 69–70, 77–82, 102 (Def.’s. Mem. 7, 8, 10 n.15, 11 n.16, 12); Hazarti ¶¶ 33, 40, 48, 52 (Def.’s. Mem. 11 n.16, 12); Yaffe ¶¶ 14, 22, 44, 45, 50, 51, 58, 59, 71 (Def.’s. Mem. 11, 16, 19).) Dr. Olanow also references studies. (See Olanow Decl. ¶¶ 44, 61, 62, 63, 64, and 65.)

Decl. ¶ 77.) Dr. Brenner’s rebuttal to Casper’s discussion of Martland’s 1928 article about “punch drunk” syndrome is duplicative and cumulative of at least Castellani’s rebuttal. (Def.’s Mem. 7–8.) And more than one expert refers to the Corsellis study. (See Iverson Decl. ¶ 78; Castellani Decl. ¶¶ 79–82.) The multiple references, however, are relatively minimal. While there is some overlap, the burden to rebut duplicative opinions—to the extent opinions are duplicative—is outweighed by the burden Defendant would face if required to revise its expert declarations and opinions and the delay to these proceedings. Plaintiffs are free to offer the same expert rebuttal to opinions regarding case studies Plaintiffs believe are duplicative.

**Issue 2: Uncertainty About the Pathology and Clinical Presentation of CTE (Castellani, Hazrati, Schneider, Yaffe)**

Plaintiffs identify the following areas of overlap relating to this issue: Castellani at Section III.A (¶¶ 62–94) and Section IV (¶¶ 121–23); Hazrati in the sections titled “The Current State of Science is in its Infancy with Respect to CTE Tauopathy,” “The Absence of CTE Tauopathy in Athletes with a History of Concussion,” “The Presence of CTE Pathology in Individuals Without a History of Head Trauma,” and “Some Athletes Have Pathologies Consistent with Multiple NDs that are Common in the General Population” (¶¶ 33–75); Schneider in the section titled “Current Scientific Understanding Of CTE” (¶¶ 21–29); and Yaffe at Section G (¶¶ 62–71).

Defendant does not rely upon ¶¶ 21–29 of Schneider’s Declaration in its Opposition to Plaintiffs’ Motion for Class Certification. The remaining experts, Drs. Castellani, Hazrati, and Yaffe, offer non-duplicative, non-cumulative opinions to

support Defendant's Opposition to Class Certification. Paragraphs 69–70 of Castellani's Declaration (Def.'s Mem. 10 n.15), for example, discuss the work of a consensus panel and report, and Castellani ¶¶ 77–82 (Def.'s Mem. 7–8) discuss Martland, reports from the 1960s, and the Corsellis findings. Paragraphs 30 and 32 of Hazrati (Def.'s Mem. 14) refer to her own experience and view of the research and case studies. Paragraph 71<sup>7</sup> of Yaffe (Def.'s Mem. 11) expresses her view that there is no consensus as to the definition of CTE.

While the opinions relied upon by Defendant may address the same subject areas—including “consensus,” case studies, and research—it is not overly burdensome for Plaintiffs to rebut the opinions on these topics. To the extent Plaintiffs believe that an opinion is duplicative, Plaintiffs' experts have the option to offer the same rebuttal point if they conclude rebuttal expert reports are necessary and choose to file them with their Reply brief.

**Issue 3: Appropriate Concussion Terminology (Brenner, Iverson, McKeag)**

Plaintiffs argue that Brenner at Sections II. B. and C. (¶¶ 43–62), Iverson at Sections IV. A. and B. (¶¶ 28–60), and McKeag at Section C (¶¶ 15–25) offer duplicative testimony on concussion terminology.

The only citations from these sections in Defendant's Opposition to Class Certification are to Brenner at ¶ 50 and McKeag at ¶ 23. (Def.'s Mem. 19.) Paragraph

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<sup>7</sup> Plaintiffs complain that Dr. Yaffe's Section G of her Declaration, ¶¶ 62–71, is duplicative of other experts. Defendant, however, relies only on ¶ 71.

23 of McKeag states:

In fact, we still lack a universally accepted definition for subconcussive impacts, and in a 2014 article, researchers described subconcussion “as a significant emerging concept” that needs “thorough consideration” for the role that it could play in causing “anatomical and/or physiological damage.” While there are some data suggesting that subconcussive impacts to the brain may lead to short- and long-term neurological syndromes, “[o]ur understanding of these phenomena is still in its infancy and evolving.” Thus, medical professionals have warned that “[c]aution is warranted in interpreting and publicizing ‘brain injury’ secondary to subconcussive blows.” This is particularly true because medical providers’ representation of what is known about this potential risk will have “huge implications for society as a whole,” including the significant medical and career decisions by countless military veterans, athletes of all ages (involved in a number of sports ranging from boxing to football to soccer), and their families.

Paragraph 50 of Brenner provides:

Moreover, in the 1928 article by Martland, often cited by Professor Casper, the author posited that a “punch drunk” syndrome might be caused by “single or repeated blows on the head or jaw which cause multiple concussion hemorrhages.” It is clear from this account that the “concussion” referred to is not the mTBI associated with that term today. Rather, as articulated at the beginning of the article, the blows at issue were “severe” ones from which it took “a fighter from one to two hours to recover” and which, in some cases, resulted in a loss of “consciousness . . . for a considerable period of time.” As elaborated in a discussion of Martland’s article in an unsigned editorial in JAMA the following year, the acute injuries at issue were akin to those sustained by “persons who die in coma from injuries to the head which have left the cranial bones unbroken.”

These opinions address arguments made by Plaintiffs, in support of their Motion for Class Certification, that the “medical and scientific community has known for over 100 years that repeated blows to the head can lead to NDDCs, even if the nomenclature or theorized cellular and subcellular effects on the brain evolved over the course of the NHL’s existence.” (Pls.’ Mem. 13.) These expert opinions are not sufficiently

duplicative or cumulative to warrant excluding the expert or corresponding declaration for purposes of class certification.<sup>8</sup>

**Issue 4: The Role of Sports Medicine and Influence from Industry (Brenner, McCrory, McKeag)**

As to issue four, Plaintiffs identify Brenner Section II. E. (¶¶ 71–77), McCrory Section titled “Mr. [sic] Casper’s Mischaracterization of the History and Benefit of Research Specific to Concussions in Sport” (¶¶ 33–75), and McKeag Section D (¶¶ 26–28) as duplicative on the Role of Sports Medicine and Influence from Industry. Of these paragraphs, Defendant only relies upon paragraph 43 of McCrory. Thus, Defendant does not offer cumulative or duplicative evidence on this issue.

**Issue 5: Changes in Historic Knowledge of CTE (Castellani, Iverson, McCrory, Yaffe)**

In their Motion to Exclude, Plaintiffs contend that Castellani Section III. A. 2. (¶¶ 76–85), Iverson Section V. B. (¶¶ 71–101), McCrory Section at page 45 (¶¶ 76–97), and Yaffe Section H (¶¶ 72–79) are duplicative on the issue of historical knowledge of CTE. Again, Defendant does not rely upon most of these paragraphs in their Opposition to Plaintiffs’ Motion for Class Certification. The paragraphs relied upon within these sections are Castellani ¶¶ 77–82 (Def.’s. Mem. 7–8), Iverson ¶¶ 73–78, 87–88 (Def.’s. Mem. 7–8, 11 n. 16), and McCrory ¶¶ 96–97 (Def.’s. Mem. 6, 17). Yaffe is not cited.

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<sup>8</sup> Plaintiffs do not refer to the “Key Terms” section in Brenner’s Declaration at ¶¶ 18–19, including Tables 1 and 2. Table 1 covers several key terms and was cited as a “see also” to Yaffe ¶ 22. (Def.’s. Mem. 19.)

There is some overlap within the paragraphs relied upon. For example, both Castellani and Iverson discuss Corsellis, and McCory refers to boxing studies. As discussed above, however, overlap in case study references are relatively minimal. And while there is some overlap, the burden to rebut duplicative opinions is outweighed by the burden Defendant would face if required to revise its expert declarations and opinions and the delay to these proceedings.

**Issue 6: Changes in Historic Knowledge of Neurological Diseases, Disorders, or Conditions (Brenner, Cassidy)**

Plaintiffs claim that Section II. D. (¶¶ 63–70) of Dr. Brenner’s Declaration is duplicative of Sections VI–VIII (¶¶ 79–94) of Dr. Cassidy’s Declaration. In these sections, Defendant cites only to Brenner ¶ 63 as a “see also” to Finkel at ¶ 28. (Def.’s Mem. 94.) Paragraph 28 of Finkel’s Declaration states:

The above serve as examples of the rigorous and operationalized processes expert health and scientific organizations conduct prior to their recommendation of new clinical practice guidelines. The medical monitoring program the plaintiffs are proposing represents a new clinical practice guideline that is not supported by scientific evidence.

Paragraph 63 of Brenner’s Declaration states:

It simply is not the case that general concussion research long ago established a definitive link between concussion/mTBI and LTND, as Professor Casper suggests. Rather, research into that posited link is ongoing, and it has not yet reached a point of maturity sufficient to support the development of clear CPGs to guide treatment or medical advice to patients with a history of participating in contact sports.

These paragraphs are cited by Defendant to address Plaintiffs’ argument about the merits of its proposed medical monitoring program. (Pls.’ Mem. 93–94.) The opinions



expressed at Finkel ¶ 28 and Brenner ¶ 63 are not cumulative or duplicative.

**Issue 7: Medical Ethics and a Duty to Warn (Iverson, McKeag, Olanow)**

Section X (¶¶ 162–166) of the Iverson Declaration, Section E of the McKeag Declaration (¶¶ 29–40), and Section IV of the Olanow Declaration (¶¶ 100–106) are identified as cumulative and duplicative. Defendant, however, does not cite to Iverson, Section X. Nor does Defendant cite to McKeag Section E or Olanow Section IV in its Opposition to Plaintiffs’ Motion for Class Certification. Thus, Defendant does not rely upon cumulative or duplicative expert testimony on this issue as framed by Plaintiffs. Indeed, it appears that Defendant primarily relies upon Dr. Joseph Sala on warnings and risk. (Def.’s. Mem. 67, 75.) Plaintiffs do not challenge Dr. Sala.

**Issue 8: The Use of Finite Element Models (Panzer, Funk)**

Defendant does not cite to Dr. Funk’s Declaration in its Opposition to Class Certification. Thus, Defendant does not offer cumulative or duplicative evidence on this issue.

**Issue 9: Video Analysis Reliability (Neale, Funk)**

As set forth above, Defendant does not rely upon Drs. Funk or Neale for class certification issues. Defendant does not cite to either declaration in its Opposition to Class Certification. Plaintiffs need not rebut these declarations for purposes of class certification.

**Issue 10: Minimum Strain Thresholds to Cause Cellular Changes (Funk, Olanow, Schneider)**

In its Opposition to Class Certification, Defendant challenges Hoshizaki’s

opinion that the average NHL player sustains at least one head hit per two games that causes strain “above the minimum threshold for causing white matter damage.” (Def.’s. Mem. 58.) Defendant relies upon Drs. Olanow and Schneider to support its arguments. (Def.’s. Mem. 58–59.)

Plaintiffs complain that ¶¶ 72–73 of Dr. Olanow’s Declaration are identical to ¶¶ 61–62 of Dr. Schneider’s Declaration. But Defendant does not rely upon these paragraphs in its Opposition to Plaintiffs’ Motion for Class Certification. And as discussed above, Defendant does not rely upon Dr. Funk. Accordingly, the opinions are not duplicative or cumulative for purposes of class certification.

**Issue 11: Minimum-Maximum Principle Strain Thresholds to Affect NDDC Risk (Olanow, Randolph, Schneider)**

Plaintiff argues that ¶¶ 74–82 of Dr. Olanow’s Declaration, ¶¶ 25(d)(v)–25(d)(vii) of Dr. Randolph’s Declaration, and ¶¶ 61–62 of Dr. Schneider’s Declaration offer cumulative or duplicative opinions addressing Dr. Hoshizaki’s opinions on this issue.

As discussed above, Defendant does not rely upon Dr. Schneider at ¶¶ 61–62. As to Dr. Randolph, Defendant also does not rely upon ¶¶ 25(d)(v)–25(d)(vii). Defendant cites only to ¶ 25(d)(ii) for the proposition that “DTI is an experimental methodology, and not used clinically or diagnostically for any purpose.” (Def.’s. Mem. 11, 59 n.41.) This is not sufficiently duplicative or cumulative of Dr. Olanow’s opinions at ¶¶ 74–82, which directly address Hoshizaki’s opinions.

**Issue 12: Unrelated Factors that Result in NDDCs (Hazrati, Finkel, Iverson, Schneider, Yaffe)**

Plaintiffs claim that five experts—Drs. Hazrati, Finkel, Iverson, Schneider, and

Yaffe—offer duplicative or cumulative opinions on Issue 12. Specifically, Plaintiffs note overlap among Hazrati’s sections titled “There are Many Potential Causes of Tauopathies in the Brains of Athletes,” ¶¶ 76–91, and “Alternative Causes of CTE Tauopathy,” ¶¶ 92–102; Finkel, ¶¶ 15–18; Iverson at Section V.F., titled “The Proposed Symptoms of CTE are ‘Nonspecific,’ Which is a Critical Scientific Problem,” ¶¶ 112–24; Schneider at section titled “Difficulties in Differentiating CTE from Other Diseases And In Isolating Head Trauma As the Cause of Disease,” ¶¶ 51–55; and Dr. Yaffe at Section E, titled “Head Trauma And Other Potential Risk Factors For Neurodegenerative Disease,” ¶¶ 36–41, and Section F, titled “Various Risk Factors Are Associated With Different Neurodegenerative Disease,” ¶¶ 42–61.

From the sections above, Defendant cites only to Hazrati ¶ 91 (Def.’s Mem. 62), Finkel ¶¶ 15, 17, 18 (Def.’s Mem. 17–18, 71), and Yaffe ¶¶ 39, 42–61 (Def.’s Mem. 16–17). While these experts may discuss similar issues, the opinions relied upon do not appear to be duplicative.

**Issue 13: The Benefits and Drawbacks of Medical Monitoring (Finkel, Olanow, Randolph, Cassidy)**

Plaintiffs claim that ¶¶ 23–60 of Dr. Finkel’s Declaration duplicate Section III of Dr. Olanow’s Declaration (¶¶ 83–99), ¶¶ 26–27 of Dr. Randolph’s Declaration, and Section XI (¶¶ 133–137) of Dr. Cassidy’s Declaration. Of those sections, Defendant only relies upon Finkel ¶¶ 24–28, 57 (Def.’s Mem. 93–94.); Olanow ¶¶ 92, 94–96, 99 (Def.’s Mem. 30, 64, 89, 94 n. 60, 94.); Randolph ¶ 27 (Def.’s Mem. 95); and Cassidy ¶¶ 119–20 (Def.’s Mem. 95). While these experts may discuss similar issues, the opinions relied

upon do not appear to be duplicative.

**E. There is Insufficient Duplication or Overlap to Warrant the Exclusion of Expert Declarations Relied Upon by Defendant for Purposes of Class Certification**

The Court appreciates Plaintiffs' concerns about the number of experts disclosed by Defendant in its Opposition to Plaintiffs' Motion for Class Certification. But after careful review of the parties' submissions, including the expert citations relied upon in Defendant's Opposition to Class Certification, the Court concludes that Defendant does not impermissibly rely upon cumulative or duplicative expert opinions for purposes of class certification. Any overlap or duplication is insufficient to justify exclusion of all or portions of the expert declarations.<sup>9</sup> The burden to Plaintiff in determining what it may choose to rebut to support its reply in support of its Motion for Class Certification is

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<sup>9</sup> To the extent there is some overlap in expert opinions relied upon for class certification, several of Defendant's experts have varying backgrounds and may offer unique perspectives. Dr. Castellani, for example, is a Neuropathologist and Founding Director of the Western Michigan University Center for Neuropathology, Professor of Pathology at Western Michigan University, Director of the Research Histology Lab, and Founding Director of the Center for Neuropathology. Dr. Iverson has a Ph.D. in Clinical Psychology, with a specialization in Neuropsychology and is a Professor in the Department of Medicine and Rehabilitation at Harvard Medical School. He is also Director at Mass General Hospital for the Children Sports Concussion Program and an Associate Director of the TBI Program for Home Base, a Red Sox Foundation. Dr. Yaffe is an M.D. and Professor in the Department of Psychiatry, Neurology and Epidemiology at the University of California, San Francisco. Having multiple experts address similar topics and subject matter does not render their opinions cumulative because they approach the issue from their own unique areas of expertise. See, e.g., Bowman v. Corr. Corp. of Am., 650 F.3d 537, 547 (6th Cir. 2003) (rejecting argument that "defendants were improperly allowed to call four medical experts" because the witnesses "possessed expertise in the distinct areas of hematology, pulmonary medicine and critical care, infectious disease, and pathology").

tempered in two ways. First, Plaintiff is not required to rebut all of the opinions set forth in the expert declarations filed by Defendant for purposes of its class certification reply. The Amended Scheduling Order provides that Plaintiffs may choose to file “true ‘rebuttal’ expert reports” if they conclude they are necessary. Second, rebutting the limited duplicative or overlapping points relied upon is not overly burdensome because the rebuttal point can be made once.

### **III. Conclusion**

Defendant did not identify or rely upon Drs. Norman, Funk, or Mr. Neale. Plaintiffs’ Motion to Exclude Declarations of Defendant’s Experts for Purposes of Plaintiffs’ Motion for Class Certification is granted only to the extent that it is not necessary for Plaintiffs to rebut Drs. Norman, Funk, or Mr. Neale for purposes of class certification. In all other respects, Plaintiffs’ motion is denied.<sup>10</sup>

### **ORDER**

#### **THEREFORE, IT IS HEREBY ORDERED THAT:**

Plaintiffs’ Motion to Exclude Declarations of Defendant’s Experts for Purposes of Plaintiffs’ Motion for Class Certification (Doc. No. 872) is **GRANTED in part** and **DENIED in part**, as set forth herein.

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<sup>10</sup> Plaintiffs’ Reply brief in support of its Motion for Class Certification is due on October 6, 2017, pursuant to Amended Pretrial Order No. 28. (Doc. No. 882.) Amended Pretrial Order No. 22 governing deadlines related to class certification provides, “[i]f Plaintiffs conclude that rebuttal expert reports are necessary (not ‘new’ expert reports but true ‘rebuttal’ expert reports) and choose to file them with their reply brief, the NHL may seek leave of the Court to file a sur-reply and/or take additional deposition testimony. At that time, the Court will consider the nature of the rebuttal expert testimony and whether further discovery and briefing is warranted.” (Doc. No. 605, ¶ 6.)